Supreme Court, U.S.
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No. 04- 04 289

IN THE

Supreme Court of the United States

DR. LIONNEL LUGO RODRIGUEZ, *et al.*,

Petitioners,

v.

PUERTO RICO INSTITUTE OF CULTURE, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

POINT I. WHETHER THE COURT ERRED WHEN IT ALLOWED THE RES JUDICATA DEFENSE.

POINT II. WHETHER THE COURT ERRED WHEN IT FOUND THAT APPELLANT/PLAINTIFF FAILED TO FILE CONTESTED FACTS IN OPPOSITION TO SUMMARY JUDGMENT AND DID NOT COMPLY WITH LOCAL RULE 311.

POINT III. WHETHER THE APPEAL COURT ERRED WHEN THE DISTRICT COURT ERRED WHEN THE COURT SUA SPONTE MOVED TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD OF AFFORDED APPELLANT/ PLAINTIFF AN OPPORTUNITY TO AMEND THEIR PLEADINGS IN THE RICO AND SECTION 1983.

LIST OF PARTIES

Petitioners are Dr. Lionnel Lugo Rodriguez, ARPO, S.E., d/b/a Plaza Suroestç Mall, Plaza Oasis, & Hotel Oasis, Inc.

Respondents are Puerto Rico Institute Of Culture; Robert L. Bonds-Davila; Jorge Ortiz-Colon; Doris Masa; Hector Cazul; Mildred Gonzalez-Valentin; Crim;, a/k/a Collection Center for Municipal Income; Ramon Nazario; Carlos Martinez; Manuel Velazquez-Aviles; Federal Insurance Company.

STATEMENT PURSUANT TO RULE 29.6

Petitioners, ARPO, S.E., d/b/a Plaza Suroestç Mall, and Plaza Oasis, & Hotel Oasis, Inc., have no parent corporations and no publicly held company owns 10% or more of either company's stock.

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Appendix B – Opinion And Order Of The United States District Court For The District Of Puerto Rico Filed August 13, 2002 ..... 10a

Appendix C – Order Of The United States Court Of Appeals For The First Circuit Denying Petition For Rehearing Dated June 1, 2004 ..... 29a

Petitioners respectfully prays that a writ of certiorari issue to review the order below.

OPINIONS BELOW

The Opinion of the First Circuit Court of Appeals decided on May 5, 2004 affirming the judgment of dismissal is reported at (*Dr. Lugo Rodriguez v. P.R Institute of Culture*, __ F.3d (1st Cir. 2004) (App. A, *infra*, 1a-9a).

The U.S. District Court for the District of Puerto Rico, issued a nonpublished opinion filed on August 13, 2002 (App. B, *infra*, 10a- 28a).

The Order First Circuit Court of Appeals denying the Petition for Rehearing en banc was entered on June 1, 2004 (App. C, *infra*, 29a).

STATEMENT OF JURISDICTION

Jurisdiction of the United States District Court for the District of Puerto Rico was based on 28 U.S.C. §§ 1331-1343. Jurisdiction of the First Circuit Court of Appeals was based on 28 U.S.C. § 1291. The United States Supreme Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. Constitutional

There is no contention that the United States District Court for the District off Puerto Rico must give full faith and credit to the judgments of the courts of the Commonwealth of Puerto Rico. 28 U.S.C. § 1738 (1982). Section 1738 requires the federal courts to give the same preclusive effect to state court judgments that these judgments would be given in the courts of the State from which the judgments emerged. *Kremer v. Chemical Construction Corp.*, 456 U.S. 466 (1982).

Petitioner's 42 U.S.C. § 1983, 1986 Civil Rights Act and Civil Rico claims are both applicable to 28 U.S.C. § 1738 application.

B. Statutory Puerto Rico Law On Res Judicata General Rule

The reviewing appellate court needed to look to the Puerto Rico Law to determine if the District Court committed error when it held that the prior state case constituted res judicata. *Rodriguez v. Baldrich*, 628 F.2d 691, 693 (1st Cir. 1980).

The pertinent Puerto Rico statute is Article 1204 of the Civil Code, 31 L.P.R.A. section 3343 that requires "the most perfect identity between the things, causes and persons of the litigants, and their capacity as such" *See Pagan Hernandez v. Universidad de Puerto Rico*, 107 P.R.R. 795, 806; 107 D.P.R. 720, 731-732 (1978); *Bolker v. Superior Court Sosa. Int.*, 82 P.R.R. 785, 792 (1961); *Futura Dev. Corp. v. Centrex Corp.*, 761 F.2d 33, 42-45 (1st Cir. 1985).

Res judicata is a judge-made doctrine based upon policy considerations, and it is appropriate to take into account equitable concerns. *Diversified Foods Inc., v. First Nat'l Bank of Boston*, 985 F.2d 27, 31 (1st Cir. 1993). The First Circuit Court of Appeals has recognized and held that under Puerto Rico law, "res judicata should not be applied inflexibly if doing so would run counter to the ends of justice when public policy concerns are present". *Baez Cruz v. Municipality of Comerio*, 140 F.3d 24, 28 (1st Cir. 1998).

Among these exceptions are those cases which are permeated by consideration of public policy, which include a previous judgment (which was null) based upon an acceptance of a claim which was null, *Vidal v. Mongas*, 66 P.R.R. 588, 599 (1946); a previous judgment entered without jurisdiction, *Tartak v. District Court and Cruz, Int.*, 74 P.R.R. 805, 812 (1953); a Superior Court judgment whose review was sought but not attained because of reasons not within the applicant's powers, *Riera v. Piza*, 85 P.R.R. 256, 267 *et seq.* (1962); the ends of justice were defeated *Feliciano Ruiz v. Alfonso Develop. Corp.*, 96 P.R.R. 105, 110 (1968).

C. Fraud As An Exception

The other exception to the res judicata rule, as in the case at bar, is where there is fraud, *Suarez Feliciano v. Superior Court*, 88 P.R.R. 133, 148 (1963).

STATEMENT OF THE CASE

On October 2, 2001, appellant/plaintiffs Dr. Lionel Lugo Rodriguez, ARPO, S.E., d/b/a Plaza Suroeste Mall, Plaza Oasis, & Hotel Oasis, Inc.,, filed a civil rights verified complaint seeking declaratory and injunctive relief and compensatory and punitive damages pursuant to Title 42, United States Code, Section 1983, 1986 & 1988, 18 U.S.C. section 1964(a) (Equity) and section (c) (Right to Sue and Treble Damages) (Civil Rico). e.g., the Organized Crime and Control Act of 1970, Pub. L. No. 91-452, Section 901(a), 84 Stat. 941, Racketeering Influenced and Corrupt Organizations, (hereinafter referred to as RICO), and Title 28, United States Code, Sections 1331 & 1343 and for violations of the Laws and Constitution of the Commonwealth of Puerto Rico under 31 L.P.R.A. Section 5141 (1990). The Verified Complaint was accompanied with an Appendix, containing seventeen (17) Exhibits. See Appellant's Appendix, (hereinafter referred to as AA) pgs. 618-699. Included in the Appendix to Complaint were five (5) sworn affidavits, four (4) of whom were previous PRIC Executive Directors and top employees. See AA pgs. 644-651, 662-667, 668-682. (Plaintiff's Appendix to Complaint, Exhibits 1, 6, 7 and 9). The facts alleged in the Verified Complaint and supported by these sworn declarations raise issues of fraud as there was no authority by codefendants to deny plaintiff his rights and petition. The exhibits also contain admission by codefendants PRIC and CRIM whom are estopped from asserting any different position in this case. These include, but are not limited to: the PRIC endorsement and seal of the Project. See AA at pgs. 652-653.

The claims in the complaint arise from a common nucleus of operative facts resulting in the predicate acts and violations of RICO by the connection with a scheme devised, conduct and/or participated by codefendants, each of whom are

employed by and are associated with defendant Puerto Rico Institute of Culture (hereinafter referred to as PRIC) and CRIM to conduct and participate, directly or indirectly, through a pattern of racketeering activity, and to conspire to do so, and to willfully and unlawfully to defraud appellant/plaintiff's assets and conspire to do so, all to the detriment of appellant/plaintiff's civil rights. The predicate acts are violations of Puerto Rico law constituting criminal behavior for public officials to forge, destroy and/or alter public documents and by the use of mail and wire.

On or around October 2000, Appellant/plaintiff Dr. Lugo Rodriguez, through conversations with the PRIC's prior Executive Director, Dr. Luis E. Diaz Hernandez, discovered for the first time that he had never denied appellant/plaintiff the tax exemption nor did he have any knowledge of the demolition required by defendant on PRIC's previous endorsements. In addition, Dr. Hernandez did not have any knowledge of the PRIC's fraudulent letters, bearing his name, allegedly written and signed by codefendants Architect Jorge Ortiz Colon, on behalf of PRIC, to appellant/plaintiff Dr. Lugo Rodriguez, regarding said endorsement and demolition requirements. See AA pgs. 644-651.

This genuine issue of material fact, never litigated before, was heavily disputed by the parties should of prevented the district court from granting defendant's summary judgment. Appellant/plaintiff's sworn statement in their appendix from the PRIC's Executive Director during the times the cause of action arose was not rebutted by defendants and raised this material fact to be decided by a jury.

Appellant/plaintiff also alleged that codefendants PRIC, CRIM and individual codefendants conspired with each other in RICO scheme and defrauded appellant/plaintiff in violation of Puerto Rico laws by public officials constituting criminal conduct and by using mail and wire service fraud, thus, violated appellant/plaintiff's civil rights. See AA pgs. 618-628.

The complaint also alleges appellant/plaintiff had a ten (10) year tax exemption for Hotel Oasis that was issued bu

the Puerto Rico Tourism Company in case No. 81-26-1-1. Said tax exemption was valid for fifteen years until 1998 and for every year from 1983-1998, no taxes were assessed by CRIM. After applying for another tax exemption renewal, CRIM, without any notice, arbitrarily and capriciously, through codefendants, retroactively reassessed the Hotel Oasis's tax assessment back to 1977 with interests and late fees in violation of law and appellant/plaintiff's property rights.

Contrary to defendant CRIM's representation to the District Court that the case was final and there was a hearing, that case went to the Supreme Court of Puerto Rico who ordered that the case be filed in the Court of First Instance where it is pending on this date after being submitted. See Addendum to Brief, pgs. 32-33.

While in administrative review, codefendants Manuel Velazquez and Osvaldo Gonzalez Aviles attempted to extort and bribe appellant/plaintiff concerning payoffs for a reduction in tax assessment which appellant/plaintiff refused. CRIM applied Ex-Post Facto laws to appellant/plaintiff and denied him due process rights and a hearing during administrative proceedings despite setting hearing dates that were never held. See AA pgs. 628-633.

On that same day the complaint was filed, codefendant CRIM, by attorney Aixa Rey-Diaz, filed it's Notice of Appearance, with numerous Spanish language documents at the filing of the complaint, as notice was given by appellant/plaintiffs attorney of the Motion for a Temporary Restraining Order (TRO) and Preliminary Injunction. See Docket No. 3. This fact is admitted to by codefendant CRIM and is undisputed.

On October 3, 2001, the District Court denied appellant/plaintiff's TRO request and, *sua sponte*, ordered appellant/plaintiff's to shown cause why the complaint should not be dismissed against CRIM for lack of subject matter jurisdiction. See AA pgs. 609-610.

On October 11, 2001, after requesting a short extension, appellant/plaintiff-appellant filed it's Reply to the Court's OSC, with a sworn statement and exhibits. Thereafter, the Court did not decide the motion. See AA pgs. 568-402.

On November 1, 2001, defendant CRIM filed an answer to the complaint and a motion to dismiss the complaint. See AA pgs. 556-562, 542-554. The basis of the motion was that allegedly appellant/plaintiff had sued CRIM in state court for the same reasons and that the case was dismissed and final and that CRIM had denied them the same relief administratively.

On November 13, 2001, appellant/plaintiff filed three motions, one to strike defendant's submission of Spanish language documents without any motions or pleadings in violation of Local Rule 108, a motion for service of pleadings and a motion for short extension of time to reply. See AA pgs. 536-537, 538-539, and 540-541.

On November 16, 2001, defendant CRIM filed it's oppositions to appellant/plaintiff's motions and admitted that they had filed Spanish language documents on October 2, 2001. They also allege that they cured any defect by subsequently submitting the English translation, with some other documents, in their motion to dismiss. See AA pgs. 532-535. The Court eventually denied appellant/plaintiff's motion to strike on May 9, 2002. See AA pgs. 182-183.

On December 18, 2002, defendant PRIC requested it's second extension of time to answer or plead, having first appeared on October 24, 2002 and requested the same. See AA pgs. 563-565, 513-514. Both requests were granted by the court. See AA p. 182. See Docket No.'s 28, 31.

On February 1, 2002, defendants PRIC filed their motion to dismiss and/for summary judgment. See AA pgs. 377-499 and filed their Statement of Material Facts in the Spanish Language. See AA pgs. 400-499. They also requesting two extensions of time to file the same in English. See AA pgs. 375-376.

On April 1, 2002, defendant PRIC submitted translation of their exhibits to Statement of Materials Facts. See AA 286-373. On that same date, defendant Fed. Insur. Co. moved to join motion to dismiss. See AA pgs. 283-285.

On May 2, 2002, appellant/plaintiff's filed it's Instanter Motion and Opposition to PRIC's Motion to Dismiss and/for Summary Judgment, with a separate Counter Statement of Materials Facts. See AA pgs. 281-282, 243-268, 269-280. These filings by appellant/plaintiff complied with Local Rules and is contrary to the Court's clearly erroneous findings that the same were not filed and codefendant PRIC's misstatement of the same.

On May 7, 2002, defendant PRIC sought leave to file reply. See AA pgs. 241-242.

On May 8, 2002, codefendant Fed. Insur. Co., (hereinafter referred to as FIC), filed it's Motion for Summary Judgment, Statement of Material Facts and Memorandum. See AA pgs. 184-217, 218-229, 240-242.

On May 13, 2002, appellant/plaintiff's filed their opposition to defendant PRIC's motion for leave to file reply. See AA pgs. 179-181.

On May 16, 2002, defendant Osvaldo Gonzalez-Aviles filed it's Motion to Dismiss, See AA pgs. 176-177 and appellant/plaintiff filed it's Opposition on June 6, 2002. See AA pgs. 167-168.

On May 28, 2002, defendant Manuel Velazquez filed an Answer to the Complaint. See AA pgs. 169-175.

On May 15, 2002, the Court granted defendant's PRIC Motion for Leave to File Reply to plaintiff's opposition against their Motion to Dismiss and/for Summary Judgment. See AA p. 178. Appellant raises the District Court's permitting numerous filings by defendant PRIC as an abuse of discretion and error.

On June 14, 2002, defendant PRIC filed another Motion Requesting fast and Brief Extension of Time. See AA pgs. 165-166.

On June 18, 2002, defendant PRIC filed it's Response to plaintiffs Counter Statement of Material Facts and Reply to Plaintiff's Opposition to the Institute's Motion to Dismiss and for Summary Judgment. See AA pgs. 152-164, 142-151.

On June 18, 2002, defendants filed four (4) motions to join motion to dismiss, included was the Puerto Rico State Court dismissal of the Mayaguez case; to withdraw as counsel, to join answer to complaint and leave to file Spanish language exhibits. See AA pgs. 136-141. Appellant's cite to the Motion to Join Motion to Dismiss and defendant PRIC's Motion to Dismiss, where both attorneys misled the district court, arguing res judicata, when that Mayaguez case was *not* final and unappealable. The arguments of res judicata in a case that is not final and unappealable is without merit as that is the first of a three prong test. These material misrepresentations by defendant's attorneys that the district court relied on were in violation of Rule 11 and constituted reversible error and is raised on appeal by appellant. (emphasis ours).

In fact, the Mayaguez case to this very date, is still proceedings in Puerto Rico State Court contrary to defendant's attorney Jose Santiago and Elisa Bobonis Lang representations to the district court. See Order, dated June 25, 2003, by the Supreme Court of Puerto Rico at Appellant's Addendum, at pgs. 30-31.

On June 25, 2002, plaintiff's filed their Motion for Leave to File Reply. See AA pgs. 121-122. On that same date, plaintiff's filed Instanter Motion Submitting English Language Exhibits. See AA pgs. 13-120.

On July 8, 2002, defendant PRIC filed their untimely Supplemental Reply to Plaintiff's opposition to the Institute's Motion to Dismiss and for Summary Judgment and a Motion to File Documents in Spanish. See AA 105-110, 103-104. The Court abused it's discretion in affording defendant PRIC

several attempts to file sur-replys to their own motions to cure defects and to rehash legal arguments when it denied plaintiffs the same relief. This one-sided did not allow for a fair level playing field three to one (3)-(1) in the case at bar.

On July 8, 2002, plaintiff's filed their Omnibus Opposition to defendant's motions as the motion to join answer attempted to amend earlier answers without leave of court in the proper manner. See AA pgs. 98-102.

On July 9, 2002, the District Court denied plaintiffs motion to file reply. AA at p. 97.

On July 16, 2002, defendant PRIC filed their opposition to defendant's FIC's Motion for Summary Judgment and Additional Uncontested Facts to Those Included in FCI Statement of Uncontested facts. See AA pgs. 74-94.

On July 21, 2002, defendant FIC filed it's Motion for Leave to File reply. See AA pgs. 72-73.

On July 22, 2002, plaintiffs filed four (4) motions for leave to file reply to FIC motion; motion to join PRIC opposition to FIC motion; motion for leave to file reply to sur-reply to PRIC; motion to strike said sur-reply as untimely. See AA pgs. 56-71.

On August 2, 2002, the Court denied leave to file reply to defendant PRIC. See AA p. 55.

Once again, on August 5, 2002, defendant untimely filed a Motion Requesting Leave to File response to Motions Filed by Plaintiffs. In said Motion for leave, defendant argues their points of law in an attempt to circumvent the Local Rules. See AA pgs. 52-54.

On August 13, 2002, the District Court issued it's Opinion and Order, granting defendant's motion to dismiss. See AA pgs. 27-51. Within said Opinion and Order, the Court made a mistake in fact that the Mayaguez and CRIM state cases were dismissed and final. The Court also erred when it stated that the fraud issues were litigated in a state case years before plaintiff even found out about the fraudulent letters by ex-

Executive Director, Dr. Luis Hernandez. On the same day, it issued a Judgment and ordered plaintiff to show cause by August 23, 2002 why it should not dismiss the remaining codefendants. See AA p. 24. On August 23, 2002, plaintiff filed a Motion to extend Time to Reply to OSC. See AA pgs. 17-19. On August 26, 2002, before the extended time requested expired, the Court dismissed the remaining defendant without waiting for plaintiff's Reply. See AA pgs. 23-24

On August 13, and August 28, 2002 the District Court entered Judgments, dismissing plaintiff's federal claims after granting defendant's Motions to Dismiss and for Summary Judgment. See AA pgs. 23, 25. On August 29, 2002, appellant/plaintiff filed a Motion for Reconsideration, Reply to Order to Show Cause and Motion for Leave to File Amended Complaint. Nunc Pro Tunc. See AA pgs. 04-22.

On September 12, 2002, appellant/plaintiffs filed its timely Notice of Appeal. See AA pgs. 02-03. This Circuit Court held in abeyance the Notice of Appeal until the district court decided and appellant/plaintiff's motion for reconsideration. See Docket No. 124. On October 24, 2002, the Court granted defendant Orlando Hernandez Motion to Amend Judgment. See AA p. 01. On March 14, 2003, the district court denied appellant/plaintiff's motion for reconsideration. See Docket No. 131.

On September 12, 2002 petitioner timely filed his Notice of Appeal. The First Circuit affirmed on May 5, 2004. App., 2-12 *infra*,

WHY THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

QUESTION I

I. WHETHER THE COURT ERRED WHEN IT ALLOWED THE RES JUDICATA DEFENSE

1. *STANDARD OF REVIEW*

Whether plaintiff have stated a claim for which relief may be granted under Federal Rules of Civil Procedure Rule 12(b)

and whether motions for summary judgment should be granted are a question of law which the Appeals Court reviews de novo. *Judge v. City of Lowell*, 160 F.3d 67, 72 (1st Cir. 1998); *LaChapelle v. Bershire Life Insur. Co*, 142 F.3d 507, 508 (1st Cir. 1998).

2. *STANDARDS TO BE APPLIED*

I. MOTION TO DISMISS

The standard for a motion to dismiss made pursuant to the federal Rules of Civil Procedure, Rule 12(b) for "failure to state a claim upon which relief can be granted" the Court must begin by assessing "(w)e begin by accepting all well-pleaded facts as true, and we draw all reasonable inferences in favor of the non-movant)". *Leblanc v. Great American Ins. Co.*, 6 F.3d 836, 841 (1st Cir. 1995); *Washington Legal Foundation v. Massachusetts Bar Foundation*, 993 F.2d 962, 971 (1st Cir. 1993).

II. MOTION FOR SUMMARY JUDGMENT

Summary Judgment is appropriate if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. Rule 56(c). The Court reviews the record in the light most favorable to the non-movant and draws all reasonable inferences in favor of the non-movant)". *Leblanc v. Great American Ins.* Co., at 841.

The party moving for summary judgment bears the initial responsibility of demonstrating the absence of genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has satisfied this requirement, the nonmoving party has the burden of presenting facts that demonstrate a genuine isse for trial. *Leblanc v. Great American Ins.* Co., at 841. The nonmovant must do more than show "some metaphysical doubt as to material facts". *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). An issue is genuine when, based on the evidence, a reasonable jury could return a verdict for the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

III. STANDARD TO BE APPLIED IS THE LAW OF THE STATE

There is no contention that the United States District Court for the District of Puerto Rico must give full faith and credit to the judgments of the courts of the Commonwealth of Puerto Rico. 28 U.S.C. section 1738 (1982). Section 1738 requires the federal courts to give the same preclusive effect to state court judgments that these judgments would be given in the courts of the State from which the judgments emerged. *Kremer v. Chemical Construction Corp.*, 456 U.S. 466 (1982). Appellant/ plaintiff's 42 U.S.C. Section 1983, 1986 Civil Rights Act and Civil Rico claims are both applicable to 28 U.S.C. section 1738 application.

IV. PUERTO RICO LAW ON RES JUDICATA-GENERAL RULE

The reviewing appellate court needed to look to the Puerto Rico Law to determine if the District Court committed error when it held that the prior state case constituted res judicata. *Rodriguez v. Baldrich*, 628 F.2d 691, 693 (1st Cir. 1980).

The pertinent Puerto Rico statute is Article 1204 of the Civil Code, 31 L.P.R.A. section 3343 that requires "the most perfect identity between the things, causes and persons of the litigants, and their capacity as such" *See Pagan Hernandez v. Universidad de Puerto Rico*, 107 P.R.R. 795, 806; 107 D.P.R. 720, 731-732 (1978); *Bolker v. Superior Court Sosa. Int.*, 82 P.R.R. 785, 792 (1961); *Futura Dev. Corp. v. Centrex Corp.*, 761 F.2d 33, 42-45 (1st Cir. 1985).

More importantly, under Puerto Rico law, claim preclusion requires a prior judgment on the merits that in the authoritative Spanish, "final y firme", which officially translated as "final and unappealable". This phrase makes manifest that Commonwealth court judgment cannot be accorded preclusive effect until all available appeals have been exhausted or the time for taking them have expired. *Cruz v. Medina*, 202 F.3d 14 (1st Cir. 2000).

The District Court made several factual determinations that were in error that supported it's determination. First of all, the District Court reviewed exclusively a state court proceeding that challenged the granting and then denial of a tax-exemption of the Project.

The Court committed error when referring to a Mayaguez state case pending that "On March 12, 2002, the Mayaguez Court of First Instance granted defendant's motion for summary judgment on res judicata grounds and entered judgment against the plaintiff's action with prejudice. See AA at p. 33. This fact and res judicata argument was promoted and plead by defendant PRIC attorney Bobonis Lang (AA p. 413) and Department of Justice Attorney Jose Cintron (AA pgs. 123-135) when both of them knew that the decision was not final, and the case was still pending as the time periods had not run. This fact was in error as the Mayaguez case is pending to this very date and appellant notified the Court of it's continuing proceedings. See AA at p. 20. To date, that case is not final and unappealable as it is in the Supreme Court of Puerto Rico. See Addendum to Brief, pgs. 30-31.

The District Court also committed error in it's factual determinations when it held that all of defendant PRIC and FIC statement of uncontested material facts were deemed admitted as "plaintiffs, however, have failed to comply with the so-called "anti-ferret rule" as they have not presented a concise statement of material facts as to which there is a genuine issue to be tried" See AA at p. 36 and 37.

Petitioner filed it's Opposition to defendant PRIC's Motion to Dismiss and For Summary Judgment with a separate, concise statement of Uncontested Facts. See AA 243-268-opposition and p. 269-280 Counter Statement. Thus, the Court was in error and appellant did comply with the Local Rule 311.11 requirements.

The District Court also committed error when it decided that "It is evident, from the Puerto Rico Circuit Court of Appeals decision, that the cause, facts and claims upon which the plaintiffs based their complaint in the State court are, in

fact, the same as the cause and claims stated in the case before this Court" See AA at p. 40. The Court erred further when it stated

> the sworn statements on which plaintiff's allegations rely contain numerous suppositions and statement's regarding PRIC's endorsements of the Project. The subject matter of these statements have been previously presented in the State Court action. The Puerto Rico Court of Appeals action decided the issue for PRIC's alleged fraud concerning Lugo's tax exemption request. Lugo could have submitted the sworn statement's attached to this complaint during the initial administrative proceeding if he had adequately prepared for the same. Plaintiff had the opportunity to fully litigate their claims both at the administrative level and before the Puerto Rico Court of Appeals on the fraud allegations presently before this Court. They cannot now pretend to relitigate these issues and have a second bite at the apple.

See AA pgs. 17-18.

This Honorable Court should take notice that the Appeals and District Court sole reliance in their summary judgment motion was on a State Appellate Court decision of an appeal from an informal administrative PRIC hearing. While the appellant did seek the tax exemption for the Project, the cause and thing of the case at bar is very different in that it requested that the Court award damages for the conspiracy and fraudulent acts and omissions of defendants that violated appellant's civil rights. In contrast to this case to the administrative informal process, there with no administrative law judge, no rules of evidence, no discovery, no adequate recording of petitioner's expert witness, as it was inaudible for transcribing for review. PRIC did no even have the originals plans of the Project at the informal hearing as they were "lost" by defendant Doris Masa.

Moreover, the PRIC decision was self-serving and controlled by the very legal department head, defendant Robert Bounds, and while involving some actors and defendants, did not involve other codefendants, agencies and causes of action, relief and rights. It was limited to the tax-exemption denial, where no allegations, findings and or issues of fraud raised. The Court's reasoning that the sworn affidavits submitted in petitioner's Appendix to Complaint could of been produced at the administrative process is impossible as they were first written in the year 2000, when appellant first learned of the Dr. Hernandez fraudulent letter and other schemes by defendants.

The issue of fraud or it's subject matter was not raised on appeal as the review was limited. There was no jurisdiction of the Appeals Court to hear any allegation of fraud as it was not an issued raised in the administrative proceedings. There was no concurrent subject matter jurisdiction of the Court to hear or to raise any federal claims, claims for damages and/or injunctive relief. There were clearly no issues of fraud raised, as petitioner first found out about the fraudulent letter of Executive Director Dr, Hernandez in fall 2000, some years later. See AA at pgs. 644-648. It is impossible to litigate an issue of fraud that appellant had no knowledge and/or information about at the time the administrative proceedings were being held. The PRIC letter by Dr. Hernandez, allegedly signed, and received by mail and fax, was given the weight by the official examiner, as well as the Board. and defendants testified to as authenticity at the hearing by codefendant Davila-Colon and Mildred Gonzalez. Accordingly, the District Court's determinations on these facts were clearly erroroneous as no issue of fraud was ever presented, rather some irregularities, that did not constitute the same elements of the cause of action of section 1983 or RICO in the case at bar.

While the District Court held that the thing and cause were the same, the issue of fraud is an exception to the general rule that will be addressed.

V. *EXCEPTIONS TO THE GENERAL RULE*

The Supreme Court of Puerto Rico has for a long time acknowledged several exceptions to the application of res judicata. In *Figueroa v. Muncipality of San Juan*, 98 P.R.R. 523, 545 (1970), it recognized that the presumption of res judicata has well-defined exceptions at law of an equitable order. *Pagan Hernandez v. Universidad de Puerto Rico*, 107 P.R.R. 795, 806; *Millan v. Caribe Morn Corp.*, 83 P.R.R. 474, 485-489 (1961); *Perez v. Bauza.* 83 P.R.R. 213, 217-218 (1961); *Suarez Fuentes v. Superior Court*, 88 P.R.R. 133, 148 (1963); *Marcano Arroyo, v. Kmart Inc.*, 81 F. Supp. 2d 301, 308 n. 17 (D.P.R. 1999).

Res judicata is a judge-made doctrine based upon policy considerations, and it is appropriate to take into account equitable concerns. *Diversified Foods Inc., v. First Nat'l Bank of Boston*, 985 F.2d 27, 31 (1st Cir. 1993). The First Circuit Court of Appeals has recognized and held that under Puerto Rico law, "res judicata should not be applied inflexibly if doing so would run counter to the ends of justice when public policy concerns are present". *Baez Cruz v. Municipality of Comerio*, 140 F.3d 24, 28 (1st. Cir. 1998).

Among these exceptions are those cases which are permeated by consideration of public policy, which include a previous judgment (which was null) based upon an acceptance of a claim which was null, *Vidal v. Mongas*, 66 P.R.R. 588, 599 (1946); a previous judgment entered without jurisdiction, *Tartak v. District Court and Cruz, Int.*, 74 P.R.R. 805, 812 (1953); a Superior Court judgment whose review was sought but not attained because of reasons not within the applicant's powers, *Riera v. Piza*, 85 P.R.R. 256, 267 et seq (1962); the ends of justice were defeated *Feliciano Ruiz v. Alfonso Develop. Corp.*, 96 P.R.R. 105, 110 (1968).

VII. *FRAUD AS AN EXCEPTION*

The other exception to the res judicata rule, as in the case at bar, is where there is fraud, *Suarez Feliciano v. Superior Court*, 88 P.R.R. 133, 148 (1963); *Bolker v. Superior Court*, 82 P.R.R. 785, 792 (1981); *Aybar v. Vara*, 51 P.R.R. 182, 184-186 (1937). *See also,*

Aponte Cratini v. Roman Torres, 98 TSPR 53,(1998) (res judicata is a valid defense as long as judgment was entered by a court exercising proper jurisdiction in the absence of fraud. *Sosa Int.*, at 82 P.R.R. 785, 792 (1961), *Aybar v. Vara*, 51 P.R.R. 182, 184-186 (1937). Accordingly, an exception to the res judicata doctrine maybe appropriate in order to allow a party to proceed on the merits. *Banco de la Vivienda v. Cario Ortiz*, 130 D.P.R. 730, 739 (1992). Therefore, the District Court committed error when it failed to applied the res judicata defense exception to the facts of our case.

VIII. *APPLICATION IN CIVIL RICO CASES*

In Civil RICO cases, the issue of fraud has been held as a bar to the res judicata and/or collateral estoppel defense which is consistent with the application herein. *See George v. United Ky. Bank, Inc.*, 753 F.2d 50 (6th Cir. 1980) (dismissal of RICO claim on issue preclusion was error when plaintiff denied opportunity to litigate fraud in a prior state court action); *Powell v. Anderson Bank & Trust Co.*, 640 F. Supp. 1568 (N.D. Ind. 1986) (no preclusive effect accorded to a prior judgment obtain through fraud).

There are several cases that also hold federal court's barring the res judicata and collateral estoppel defenses, even where fraud was alleged in the prior case. Differing burdens of proof between state fraud claims and civil RICO fraud allegations vary and may also bar issue preclusion.

Thus, in *Wilcox v. First Interstate Bank of Oregon*, 815 F.2d 522 (9th Cir. 1987), the Ninth Circuit held because civil RICO claims need to be proven only by perponderence of evidence, whereas common law fraud allegations had to be suppoorted by clear and convincing evidence, a jury's finding of no liability for common law fraud would not preclude bringing a civil Rico suit on the same facts.

By analogy, courts have failed to grant the preclusive effect in prior criminal cases. Determining which issues were actually decided in a prior litigation is a question of law for the court. *Emich Motors Corp., v. General Motors Corp.*, 340 U.S. 558, 571

(1951). Courts generally look to the record in the prior case, including the pleadings, the ev idence, jury instructions and judicial rulings. *See Ashe v. Swenson*, 397 U.S. 436 (1990). Unless the facts adjudicated in a prior criminal proceedings are clear, courts have tended to deny application of issue preclusion in related civil suits. *See Apply v. West*, 832 F.2d 1021 (7th Cir. 1987)(no preclusion in civil RICO case in amount of damages based on prior criminal conviction).

VIII. *THERE IS A PUBLIC POLICY CONSIDERATION EXCEPTION THAT WARRANTS BARRING RES JUDICATA DEFENSE*

It is abundantly illustrated in petitioners record, i.e., Verified Complaint, Appendix to Verified Complaint, and Counter-Statement of Contested Facts, that contain several allegations of fraud with documentary evidence, were not rebutted by defendant. It is exactly this type of case involving fraud that the Puerto Rico Supreme Courts jurisprudence, with strong public policy considerations, has long held to prevent an injustice where a judgment has been obtained through fraud.

As cited above, the Supreme Court of Puerto Rico has recognized several exceptions, including cases that are permeated by public order considerations. Two leading cases cited are *Perez v. Bauza, supra*, and *Millan v. Caribe Motors Corp., supra.*

In *Millan v. Caribe Motors Corp.*, the Supreme Court of Puerto Rico affirmed a Superior Court judgment allowing Petitioner to recover for damages in an action for recission of a conditional sales contract, albeit in a prior suit the vendor had repossessed the truck because of default in the payments. The Millan Court refused to apply res judicata because the vendee's consent had ben obtained by deceit, there were formal defects in the conditional sales contract in open violation of Puerto Rico Conditional Sales Act, and the initial suit (repossession) was a summary and special proceeding. *See Pagan Hernandez*, 107 D.P.R. at 737.

In *Perez v. Bauza*, a filiation suit brought four years after dismissal for want of prosecution, the Puerto Rico Supreme Court held that special circumstances warranted that, as an exception to the general rule. res judicata be inapplicable. In *Perez*, there were special public policy considerations of filiation.

In the case at bar, we have public officials in an administrative agency violating the public trust of it's citizens by a scheme and pattern of criminal behaviour that is ever present in our society today. Courts should not reward parties, especially public officials, who perpetrate fraud on the legal system with the protective veil of the res judicata or collateral estoppel defense. To do so, would be against public policy and send the wrong message to persons hiding behind agencies shield while committing acts of fraud and false documentation, which is a crime under the Criminal Code of Puerto Rico.

Therefore, the exception to the res judicata and collateral defense should of been applied in our case because of the public policy considerations stated herein in keeping the public trust and keeping the public accountability.

IX. *APPLICATION OF THE EXCEPTION TO THE FACTS*

The Court of Appeals committed error when it affirmed the Judgment of the District Court. The District Court committed reversable error when it reliance on a prior state court case is fatal as fraud is an exception tom the defense of res judicata. Accordingly, the Opinion and Order of the Court should be reversed applying Puerto Rico Law. While this argument is conclusive, appellant will further illustrate fraud found in the record in appellant's Counter Statement of Uncontested Facts.

The fraudulent documentation utilized by codefendants in the prior case is found in the record in Petitioners Appendix to Verified Complaint, for example Dr. Luis E. Diaz Hernandez's Sworn Declaration, dated January 29th, 2001. AA at pgs. 644-648.

In Dr. Diaz Hernandez's sworn statement there is sufficient evidence to find that there are numerous incidences of fraud involving at least three (3) different codefendants, Ortiz-Colon, Gonzalez-Valentin and Robert Bounds, that raise material issues of fact to defeat defendant's summary judgment motion. Additionally, the complaint and record does state a claim upon which relief can be granted to defeat defendant's motion to dismiss.

These material facts as to which there are genuine issues to be tried in the Hemandez Declaration states the following facts, that are also included in petitioners Statement of Material Facts filed separately: they are:

1) that he was the Director for the Puerto Rico Institute of Culture between the years of 1995 through 1997 and that Mr. William Marini was his assistant.

2) In reference to the final report in relation to the tax exemption that was drafted by Architect Mildred Gonzalez Valentin, dated November 4th, 1997, the declarant states that the July 7, 1997 Memorandum, purportedly drafted by him as the Executive Director and which bears the signature of Architect Jorge Ortiz Colon.

3) that it also surfaces from said Report and letter dated July 7, 1997, and addressed to Mr. Lionel Lugo Rodriguez, and unsigned but gives the impression that it had originated by him, that he had never seen either of these.

4) that these had not been part of his approval or signature.

5) that his assistant, Mr. William Marini does not have any knowledge about the same.

6) whereby the July 7, 1997 and letter are void, and should have never formed part of such report.

7) that the use given the Mildred Gonzalez Valentin final report was brought to his attention at the time of the declaration, whereby such false documentation was enclosed,

and prompted a denial of the tax exemption application in the above stated case.

8) and which, from it's inception, had been approved by the Puerto Rico Institute of Culture, and was subsequently subject of a judicial review procedure in which the basic document to be adjudicated upon composed by said report, and which to my understanding, was defective from its inception.

9) that the tax exemption letter request for Plaza Sur Oeste Building was within the files of PRIC and forwarded to him by mail and fax and for reasons about which he have neither known, nor about the apparent inconsistencies effectuated by PRIC officials,

10) that had he acquired knowledge about such inconsistencies, he would of investigated them.

11) that he relieved Jorge Ortiz Colon from his duties as the Built Historical Patrimony Director, effective the month of July of 1997 and that same date is when the non-authorized and voided documents surface.

12) that he never rejected any Tax Exemption for the Plaza Sur-Oeste Building.

13) that upon reviewing the documentation submitted herein and noticing at this time that they had the go ahead and endorsement from the PRIC for a 3-level building, that the project had been completed.

14) that he would of granted such tax exemptions retroactively for 10 years with renewal since such project had complied with all of the requirements from the Institute of Culture and other agencies therein.

15) that the current application is for a three level one which was approved and endorsed on September 15th of 1989 by Architect Ortiz Colon, after building plans had been reviewed, and which has the seal of approval om the PRIC, dated May 15th, of 1992.

16) that in the Gonzalez Valentin final report, she mistakenly classified said project as one for refurbishing, when same should of been for a restructuring.

17) Said project currently has approval from the PRIC and the Arpe Certification and also permits from all other agencies, whereby it is entitled to a retroactive exemption, and a 10 year renewal, since same was completed in full and was certified through approval by the PRIC since May 15, of 1992.

18) that the tunnel protection plan during said construction was subsequent to the PRIC's endorsement, since the endorsement of Architect Ortiz Colon on September 15th of 1989, specifically for the Plaza Sur Este Building, and it's blueprints, approved by ARPO.

In contrast, appellee/defendant in it's Motion to Dismiss mischaracterized petitioners allegation and documents in an attempt to explain and rectify an untenable legal position that was replete with fraud. The Hernandez Declaration stated sworn facts that were in direct opposite and contrasted with defendant's alleged facts as stated in their Statement of Material Facts as to which there is No Genuine Issues to Be Tried. See AA at p. 269-280.

For example, references to the codefendant Gonzalez-Valentin final report used the July 7, 1997 Ortiz Colon (fraudulent) letter, stating that based upon these observations and recommendations, the Institute denied the application for endorsement. The administrative hearing where Mildred Gonzalez testified also was used. In Nov. 4, 1997 the Final Report, by codefendant Gonzalez, it incorporated Dr. Diaz Hernandez's July 7, 1997 Memorandum in her decision to recommend five year exemption but stated that a signed copy had not been received. See AA p. 277.

Defendant Valentin testified and stated that the Board of Directors of the Institute adopted said report and denied the endorsement; mistakenly interpreted petitioners motion for consideration and attempted to promote the draft theory of the Hernandez July 7, 1997 Memorandum, referring to the draft

without any explanation that contradicts petitioners Hernandez Declaration.

Accordingly, the District Court's finding that petitioner could of raised this issue in the appellate review of an informal administrative hearing was incorrect as there was no jurisdiction to hear these claims raised herein. This is also an exception to the general rule of res judicata bar petitioners attorney relied on the fraud exception to rebut defendant's res judicata arguments.

Petitioner's complete record, Verified Complaint and Appendix also contained several other documents that involved sworn declarations that raised materials facts of fraud that needed to be presented to a jury. See AA p. 662-664 Luis Ruiz Quirindongo, advisor to PRIC Executive Director, Dr. Jose Ramon de La Torre, until January 31, 2001, stated "that it was evident that documents had been concealed, and possible crimes committed therein, which induced errors within the examiner's report, as well as the courts and officials of the Cultural Institute." See AA at 662-664. There are other references in the record, sworn declarations by all high ranking PRIC officials that supported appellant's contention of on-going fraud to date. See AA 668-671, PRIC's former Executive Director; Dr. Jose de la Torre Martinez, See 674-677 Edgar Correa Salagado, PRIC Press Director, that also illustrates the on-going fraud. The three previous PRIC"s Executive Director's sworn declarations were never rebutted by the Court and/or appellees and could not be wrong in assessing the veracity of petitioner's claims in the case at bar.

Appellant's requests for a tax exemption, even before the Project qualified, is clear from the record AA at p. 277-280, translated at AA p. 113-120 and is contrary to appellee's waiver argument.

The Court's reliance on the waiver and collateral argument were in error as the alleged RICO & 1983 were different set of facts and legal issues that were never litigated and different from the tax exemption sole issue.

More decisively, fraud is an exception that does bars the res judicata affirmative defense under abundant applicable authority under the Commonwealth of Puerto Rico Laws and jurisprudence cited herein.

The District Court erred when it disregarded petitioners contested facts and allowed the res judicata defense in a case that is procedurally and factually different.

X. PENDING STATE COURT CASES CAN NOT BE RES JUDICATA

Petitioner assert that the court's finding of fact that the Mayaguez Court granted defendant PRIC's motion for summary judgment on March 12, 2002 is clearly erroneous. The case is not final. *Cruz v. Medina*, 202 F.3d 14 (1st Cir. 2000). That case was scheduled for a October 7,2002 hearing after rescheduling the July 22, 2002 hearing See AA at p. 20. See Addendum to Brief at p. 30-31.

Likewise, the District Court reached the same wrong factual determination that the CRIM state court case, also raised by codefendant, had been dismissed and was final. See AA at p. 21-22. In order for res judicata to be a bar, all available appeals have to be exhausted or the time for taking them have expired. *Id.* Both PRIC and CRIM state court cases were not final, contrary to the mis representation to the Court by defendant's attorneys under Rule 11 certification, that were misleading and incorrect.

The District Court's reliance on those misrepresentations by these codefendants can not be given any res judicata effect on those pending state cases pursuant to applicable case law cited herein.

According, the claims against all individual codefendants, PRIC and CRIM should not of been dismissed based upon these grounds. Thus, the Judgment should be vacated and set aside for all of codefendants.

QUESTION II

I. WHETHER THE COURT ERRED WHEN IT FOUND THAT PETITIONER FAILED TO FILE CONTESTED FACTS IN OPPOSITION TO SUMMARY JUDGMENT AND DID NOT COMPLY WITH LOCAL RULE 311

The District Court erred when it found that petitioners had not complied with the requirements of Local Rule 311.11 and found all of defendants allegations were deemed admitted. See AA at p. 37. Appellant's opposed PRIC and Federal Insurances's Motion for Summary Judgment with a Counter Statement of Material Facts in compliance with Local Rule 311.11. See AA ai p. 269-280. The separate, concise statement of facts were supported with Sworn Affidavits and letters from PRIC that rebutted their waiver arguments and references were made to the record. These material contested facts were listed in petitioners contested issues of facts that was submitted to this Court on May 2, 2002.

Thus, petitioners Counter-Statement of Contested Facts did comply with Local Rule 311.11 and should of been afforded the same effect that was given to defendant's.

Petitioners initial Verified Complaint had attached to it an Appendix with seventeen (17) exhibits that had admissions from codefendants. See AA 618-699.

These exhibits had a prima facie effect of promissory estoppel against defendants from alleging disputed facts and a res judicata bar as petitioners had detrimentally relied on defendant's approval in their construction of their property.

Petitioners Counter-Statement of Contested Facts stated eighteen (18) contested facts: See AA at 269-280. It contained the following materials facts:

The fraudulent documentation utilized by codefendants in the prior case is found in the record in Petitioners Appendix to Verified Complaint, for example in Exhibit No. 1, Dr. Luis E. Diaz Hernandez's Sworn Declaration, dated January 29th, 2001. See AA at p. 264-268.

In Dr. Diaz Hernandez's sworn statement there was sufficient evidence to find that there were numerous incidences of fraud involving at least three (3) different codefendants that raise material issues of fact to defeat defendant's summary judgment motion. Additionally, the complaint and record did state a claim upon which relief can be granted to defeat defendant's motion to dismiss.

These material facts as to which there are genuine issues to be tried in the Hemandez Declaration stated the following facts, that are also included in petitioners Statement of Material Facts filed separately: they are:

1) that he was the Director for the Puerto Rico Institute of Culture between the years of 1995 through 1997 and that Mr. William Marini was his assistant.

2) In reference to the final report in relation to the tax exemption that was drafted by Architect Mildred Gonzalez Valentin, dated November 4th, 1997, the declarant states that the July 7, 1997 Memorandum, purportedly drafted by him as the Executive Director and which bears the signature of Architect Jorge Ortiz Colon.

3) that it also surfaces from said Report and letter dated July 7, 1997, and addressed to Mr. Lionel Lugo Rodriguez, and unsigned but gives the impression that it had originated by him, that he had never seen either of these.

4) that these had not been part of his approval or signature.

5) that his assistant, Mr. William Marini does not have any knowledge about the same.

6) whereby the July 7, 1997 and letter are void, and should have never formed part of such report.

7) that the use given the Mildred Gonzalez Valentin final report was brought to his attention at the time of the declaration, whereby such false documentation was enclosed, and prompted a denial of the tax exemption application in the above stated case.

8) and which, from it's inception, had been approved by the Puerto Rico Institute of Culture, and was subsequently subject of a judicial review procedure in which the basic document to be adjudicated upon composed by said report, and which to my understanding, was defective from its inception.

9) that the tax exemption letter request for Plaza Sur Oeste Building was within the files of PRIC and forwarded to him by mail and fax and for reasons about which he have neither known, nor about the apparent inconsistencies effectuated by PRIC officials.

10) that had he acquired knowledge about such inconsistencies, he would of investigated them.

11) that he relieved Jorge Ortiz Colon from his duties as the Built Historical Patrimony Director, effective the month of July of 1997 and that same date is when the non-authorized and voided documents surface.

12) that he never rejected any Tax Exemption for the Plaza Sur-Oeste Building.

13) that upon reviewing the documentation submitted herein and noticing at this time that they had the go ahead and endorsement from the PRIC for a 3-level building, that the project had been completed.

14) that he would of granted such tax exemptions retroactively for 10 years with renewal since such project had complied with all of the requirements from the Institute of Culture and other agencies therein.

15) that the current application is for a three level one which was approved and endorsed on September 15th of 1989 by Architect Ortiz Colon, after building plans had been reviewed, and which has the seal of approval of the PRIC, dated May 15th, of 1992.

16) that in the Gonzalez Valentin final report, she mistakenly classified said project as one for refurbishing, when same should of been for a restructuring.

17) Said project currently has approval from the PRIC and the Arpe Certification and also permits from all other agencies, whereby it is entitled to a retroactive exemption, and a 10 year renewal, since same was completed in full and was certified through approval by the PRIC since May 15, of 1992.

18) that the tunnel protection plan during said construction was subsequent to the PRIC's endorsement, since the endorsement of Architect Ortiz Colon on September 15th of 1989, specifically for the Plaza Sur Este Building, and it's blueprints, approved by ARPO.

In contrast, appellee/defendant in it's Motion to Dismiss mischaracterized petitioners allegation and documents in an attempt to explain and rectify an untenable legal position that is replete with fraud. The Hernandez Declaration stated sworn facts that were in direct opposite and contrast with defendant's alleged facts as stated in their Statement of Material Facts as to which there is No Genuine Issues to Be Tried.

Thus, the District Court erred when it found that appellant had not complied with Local Rule 311.11 and deemed as admitted all of defendant's materials facts alleged in their motions.

The Court of Appeals did not rule on this issue which was crucial to the District Court's decision that found that the Puerto Rico Court of Appeals had an opportunity to hear these claims which is contrary to case law and procedural challenges to an administrative findings under the laws of Puerto Rico.

QUESTION III

I. WHETHER THE APPEAL COURT ERRED WHEN THE DISTRICT COURT ERRED WHEN THE COURT SUA SPONTE MOVED TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CAUSE OF ACTION SHOULD OF AFFORDED APPELLANT/PLAINTIFF AN OPPORTUNITY TO AMEND THEIR PLEADINGS IN THE RICO AND SECTION 1983

Despite all of the pre-trial motion practice, no motion to dismiss was filed for failure to state a RICO cause of action. Rather, this Court sua sponte, raised the issue without giving petitioners an meaningful opportunity to respond by amending their complaint.

This Court in it's sound discretion and sense of fairness and justice should allow petitioners an opportunity to amend their pleadings as Civil RICO cases are complex and the pleadings requirements more specific.

Petitioners had requested a twenty (20) day period to file an amended complaint as "justice requires" pursuant to Fed. R. Civ. Proc., Rule 15(a) and the burden is usually on the party opposing the amendment to demonstrate why the amendment should not be permitted. *Firestone v Firestone*, 76 F.3rd 1205, 1209 (D.C. Cir 1996) (per curiam) (criticizing district court's "complete failure" to explain grounds for denying leave to amend).

Petitioner's requested their Motion for Reconsideration and Leave to File to Amend. See AA pgs. 4-21. The Court's finding the heightened pleading requirements were not met should not of ended the case at that point. There are Standing Orders in our District Court For Puerto Rico by Judges to avoid these heightened requirements that the Fed. Rules of Civil Proc. Rule 8 liberal pleading versus Rule 9(b), specific. The Supreme Court of the United States has held that federal courts cannot impose a greater degree of pleading particularity than required under Rule 8. *Leatherman v. Tarrant County*, 507 U.S. 163 (1993). This adherence should limit the the application of Rule 9(b) to

those aspects of a RICO claim sounding in fraud. *See Ray v. Karris*, 780 F.2d 636 (6th Cir. 1985) (remanded the case to allow repleading RICO claim, but it did not mandate or sanction the use of Federal Rules regarding the sufficiency of pleadings).

The District Court in it's sound discretion should of granted plaintiff's motion for leave to file an amended complaint. The denial of the motion constituted an abuse of discretion when compared that the Court allowed defendants numerous and multiple extensions of time and leave to file sur-reply.

The Court of Appeals in it's Order, also committed error when it improperly applied the wrong standard of review concerning the complaint, pleadings and exhibits. The Appeals Court analyized the pleadings applying the improper standard of review and not the standard under Rule 12 as discussed above in Question 1. The reviewing Court was premature in it's review of the pleadings, etc. and affirming the decision when the District Court did not review the pleadings and only dismissed the case on res judicata grounds and not on the sufficiency of the pleadings grounds used by the Appeals Court.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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APPENDIX A – OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 5, 2004

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

No. 02-2305

LIONEL LUGO RODRIGUEZ, ET AL.,

Plaintiffs, Appellants,

v.

PUERTO RICO INSTITUTE OF CULTURE, ET AL.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

[Hon. Jay A. Garcia-Gregory, *U.S. District Judge*]

Before

Selya, Circuit Judge,
Coffin, Senior Circuit Judge,
and Lipez, Circuit Judge.

COFFIN, Senior Circuit Judge. For more than a decade, appellant Lionel Lugo Rodríguez has been pursuing an endorsement from the Puerto Rico Institute of Culture ("PRIC") for his shopping mall project in an historic district of San Germán, Puerto Rico. Such an endorsement is a prerequisite for the project to be classified as tax-exempt, and Commonwealth administrative and judicial proceedings concluded with denial of the

endorsement. Appellant argues here that the process leading to that result was tainted by fraud, and he seeks a remedy under federal RICO and civil rights law, as well as under Puerto Rico tort provisions. We agree with the district court that appellant already has had his day in court on this matter and that further deliberation on the particulars is barred by the doctrine of res judicata. We decline to add another lengthy chapter to the saga and therefore provide background only as necessary to explain our conclusion.

The merits of appellant's claim that PRIC wrongfully denied him its endorsement were thoroughly considered by the Puerto Rico Circuit Court of Appeals, which reviewed the voluminous correspondence and other documentary evidence generated between 1988 and 1998, as well as the administrative transcript, and concluded that appellant "did not fulfill his obligation to show any irregularity in the proceedings." Rather, the court determined that the PRIC endorsement was denied because appellant failed to satisfy the architectural requirements that the agency had specified. Appellant claims that newly discovered evidence of fraud entitles him to revisit this judgment. Appellees respond with multiple bases for dismissing the federal claims, including appellant's alleged failure to adequately plead a RICO cause of action, Eleventh Amendment immunity, and the *Rooker-Feldman* doctrine. With an exception we address below, *see infra* at note 2, we believe that the most direct path—and thus the most appropriate—is via preclusion principles.

Res judicata under Puerto Rico law precludes "only claims that were or could have been raised in a previous suit," *Boateng v. InterAmerican Univ., Inc.*, 210 F.3d 56, 62 (1st Cir.2000), and there must be " 'the most perfect identity between the things, causes, and persons of the litigants,

and their capacity as such,' " *id.* at 61 (quoting P.R. Laws Ann. tit. 31, § 3343). The resemblance between the cases need not literally be "perfect," however. *Id.* "For res judicata purposes, '[t]he thing corresponds basically to the object or matter over which the action is exercised.' " *Id.* (quoting *Lausell Marxuach v. Díaz De Yáñez*, 3 P.R. Offic. Trans. __, slip op. at 7 (1993)). The "cause" refers to "the main ground or origin of the action." *Id.; see also Worldwide Food Distributors, Inc. v. Alberic Colón Bermúdez*, 133 D.P.R. 827, 33 P.R. Offic. Trans. ––, slip op. at 7, 1993 WL 840035 (1993) (" 'the cause is equivalent to a ground or reason for asking' ") (citation omitted). Preclusive effect is given only to judgments that are "final and unappealable." *Boateng*, 210 F.3d at 63.

We conclude that the prerequisites for application of res judicata are met here. Unquestionably, the underlying issue—the legitimacy of PRIC's refusal to grant appellant an endorsement for a tax exemption—is identical, matching both "thing" (the endorsement) and "cause" (the validity of its denial). The commonwealth circuit court decision on which we rely became final when the Puerto Rico Supreme Court denied certiorari in March 1999.[1] The parties, in pertinent respects, are the same.[2]

1. Shortly before he filed this federal action, appellant filed a second commonwealth lawsuit against PRIC raising claims stemming from the denial of the tax exemption. The Puerto Rico Court of First Instance dismissed that complaint with prejudice, and his petition for review remains pending in the Puerto Rico Supreme Court. It is appellant's earlier commonwealth action, however, that provides the basis for our res judicata holding. It appears that appellant also filed a separate commonwealth action against the Municipal Revenue Collection Center (CRIM), another defendant in this case, and that the CRIM action remains pending as well.

2. We note that the original commonwealth action involved only appellant and PRIC. Although the federal lawsuit named additional plaintiffs and defendants, the district court supportably determined that

(Cont'd)

Appellant nonetheless maintains that the commonwealth judgment may not be given res judicata effect because it was infected by fraud, and the presence of fraud triggers an exception to the doctrine of res judicata. *See, e.g., Medina v. Chase Manhattan Bank, N.A.*, 737 F.2d 140, 144 (1st Cir.1984).[3] Moreover, he contends that the new allegations of fraud that underlie his RICO and civil rights claims distinguish this case from the earlier litigation and could not have been raised earlier—making res judicata by definition inapplicable.

(Cont'd)
most of the new parties (appellant's business entities, individual PRIC officials and PRIC's insurer) held the same interests as the original parties, so res judicata applies as well to the claims against them. *See Perez-Guzman v. Gracia*, 346 F.3d 229, 233-38 (1st Cir.2003); *Paniagua v. Corporacion de Fomento Recreativo*, 986 F.Supp. 694, 697 (D.P.R.1997) (citing *Acevedo Santiago v. Western Digital Caribe, Inc.*, 140 D.P.R. 452, 40 P.R. Off. Trans. __ (1996)).

The one possible exception is CRIM (along with several CRIM employees), but the claims against CRIM were properly dismissed for other reasons. Appellant acknowledges that the Butler Act, 48 U.S.C. § 872, prohibits a federal court from barring CRIM's collection of the disputed taxes on his project. He makes an additional due process claim, undeveloped in his brief, based on the revocation of a fifteen-year tax exemption apparently granted to the property before he owned it. We decline to delve below the murky surface of this allegation, but note that the challenged reassessment occurred no later than 1998; any resulting constitutional claim would have been subject to a one-year statute of limitations. *See Ruiz-Sulsona v. Univ. of Puerto Rico*, 334 F.3d 157, 159 (1st Cir.2003). His assertion that he did not discover the reassessment until 2001 is belied by his statement that he learned of the alleged retroactive debt in 1998 when he went to the Puerto Rico Tourism Company to apply for an extension of the tax exemption. *See, e.g.*, Reply to Order to Show Cause and Motion for Reconsideration; Affirmation in Support to Supplemental Opposition to Motion to Dismiss.

3. At oral argument, appellant's counsel made passing reference as well to the public policy exception to res judicata, *see Medina*, 737 F.2d at 144. The point was not developed, however, and in these circumstances, we fail to see how it would provide an independent basis for avoiding the doctrine.

Appendix A

As best we can tell, the centerpiece of appellant's fraud claim is the draft of a letter, dated July 7, 1997, prepared by architect Jorge Ortiz Colón for signature by PRIC's director at the time, Dr. Luis E. Díaz Hernández. It is undisputed that the letter, communicating denial of the Institute's endorsement of a tax exemption, was never sent, and that appellant was actually notified of the denial in September 1997 by another PRIC official.[4] It is also undisputed that Díaz Hernández had no contemporaneous knowledge of the draft letter. Appellant claims, however, that the letter was relied upon in a report written by PRIC architect Mildred González Valentín and that González Valentín testified at the PRIC administrative hearing that she had a signed copy of the letter. Appellant suggests that use of the letter, without its purported author's knowledge, was fraudulent and that the letter tilted the proceedings against him.

We are unable to discern the fraud in these allegations. There is nothing in the record to indicate that anyone deliberately misrepresented the draft letter as the actual decision of Díaz Hernández. Although it is alleged that González Valentín relied on the letter in her report (which apparently is not part of the record on appeal), this assertion is of limited significance for two reasons. First, the letter simply summarizes the results of PRIC's internal evaluation of the exemption request, matters that were directly considered at the administrative hearing and by the court on review. Nothing in the record indicates that the result at either stage was affected by the "opinion" on those matters of Díaz Hernández—who was no longer PRIC's director at the time the endorsement was denied. Second, the record indicates that González Valentín concluded in her report that, despite the problems she

4. The record indicates the notification letter was sent by Héctor F. Santiago Cazull, then Assistant Director of the Institute's Patrimony Conservation area.

identified through an examination of the building and relevant documents, a five-year tax exemption would be appropriate if the construction blueprints for the project had previously received official approval, which would indicate compliance with PRIC's requirements for preserving the building's historical value. In other words, despite the presence of the draft letter in her report, González Valentín recommended an exemption if PRIC's evaluation showed that the project met historical standards.

Thus, rather than reflecting fraud because it included the draft letter, the architect's report suggests that the exemption was denied because the project did not fulfill the specified requirements—which was the conclusion reached in both the administrative and judicial proceedings.[5] We thus find no basis for assigning the letter any significance in PRIC's decision to deny endorsement, and certainly no indication that it was fraudulently used to induce an unjustified result.

In support of his claims, appellant submitted sworn statements from Díaz Hernández, the PRIC director who was the nominal author of the July 7 letter, and three others. Although several of the statements make conclusory reference to fraudulent activity, including forged documents, fraudulent documents and "other improprieties," the only specific assertions of wrongdoing appear to refer to the Ortiz Colón draft letter or the

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5. Although appellant asserts that González Valentín testified that she had a signed copy of the Díaz Hernández letter, there is some ambiguity in the record about the certainty of that statement. The lack of clarity is of no consequence, however, because the record contains no other evidence that any copy of the letter, which unquestionably was a draft, was signed. The only reasonable inference to be drawn, therefore, is that González Valentín's testimony, if accurately described, reflected an error on her part and is not evidence of fraud.

González Valentín report, which, as we have discussed, cannot support a fraud claim. As the following descriptions reveal, the offered sworn statements fail to assist appellant in meeting his obligation under Fed.R.Civ.P. 9(b) to allege his claim of fraud "with particularity." *See United States v. Karvelas*, 360 F.3d 220, 226 (1st Cir.2004) ("Rule 9(b) requires that a plaintiff's averments of fraud specify the time, place, and content of the alleged false or fraudulent representations.").

In his statement, Díaz Hernández, who left his position before the endorsement was denied, confirms that he did not write the July 7 letter, criticizes its inclusion in the architect's report and refers to "apparent inconsistencies effectuated by officials at the Culture Institute." He states that he would have granted a ten-year tax exemption because the project had complied with all of PRIC's requirements, but his general declaration of compliance contradicts the agency's and court's formal findings that the requirements were not fulfilled. None of his assertions casts doubt on the integrity of the review process conducted by the Puerto Rico circuit court or provides a basis for devaluing the finality of its judgment.

Each of the other three affiants, all of whom worked for PRIC, also offered only conclusory assertions of wrongdoing. Luis A. Ruiz Quirindongo, an advisor to another PRIC director, Dr. José Ramón de la Torre Martínez, stated that the file on appellant's project showed that "documents had been concealed, and that possible crimes committed therein, which induced errors within the examiner's official report, as well as the courts and officials of the Culture Institute." Ruiz stated that documentation was forged, but did not specify the documents. He further stated that PRIC's auditor concluded that there had been "an agreement . . . to

commit and to cover up crimes" related to appellant's project. Such a bald claim of fraud, left unsubstantiated with any particular misconduct, is insufficient to satisfy Rule 9(b) or to justify re-opening the administrative process.

The remaining two affidavits were similarly lacking in particularity. De la Torre, who had left his position at PRIC by the time of his statement, reported that he "became aware of certain questionable details executed during the process of denial of [appellant's] tax exemption application." He asserted that architect Ortiz Colón "apparently induced the Institute and the Courts to err, by creating the false impression" that Ortiz Colón's written endorsement was for a limited portion of the project, the tunnel protection plan. The Puerto Rico court, however, directly reviewed the file materials and concluded otherwise.[6]

The final affidavit was from Edgar Correa Salgado, PRIC's Press and Communication Director under de la Torre. Correa refers to "the existence of certain fraudulent documents prepared by Architect Jorge Ortíz Colón" and his—Correa's—recommendation that an internal investigation be conducted into appellant's allegations of improprieties in the endorsement process. Again, there is no identification of particular "fraudulent documents," other than, apparently, the draft letter. According to Correa, when he confronted de la Torre with information regarding "other improprieties and internal security problems" affecting PRIC, de la Torre informed him that

6. The court's opinion stated that "it is clearly evident from the file—in particular from the documentary evidence provided by the petitioner himself—that said endorsement was given for the blueprints that submitted 'the corrective[ ] measures taken in order to separate (sic) the affected parts of the tunnel', . . . and that the same did not amount to or constitute an endorsement for the project to be carried out in the building."

he was proceeding with his immediate resignation and "that he would not carry out any action in relation to [appellant's] case."

None of these statements contain factual allegations adequate to undergird appellant's conclusory fraud claim. Even with respect to the July 7 draft letter and the González Valentín report, the statements aver no fraudulent link to the administrative and judicial evaluation process. If such generalities were enough to justify renewed inquiry into PRIC's denial of the endorsement, the finality of judgments would be seriously compromised. Lacking a viable fraud claim, appellant may not escape the preclusive effects of the prior proceedings. Moreover, his inability to adequately allege fraud defeats any RICO claim, which depends upon a showing of at least two predicate acts of "racketeering activity," conduct that in this case was alleged to be mail and wire fraud. *See North Bridge Assocs., Inc. v. Boldt*, 274 F.3d 38, 42 (1st Cir.2001). Finally, to the extent appellant asserts a section 1983 claim based on conduct unrelated to the revocation of the tax exemption, *see* note 2 *supra*, it is insufficiently elaborated in his brief to permit meaningful review and is therefore waived. We thus affirm the district court's judgment of dismissal.[7]

Affirmed.

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7. We have considered appellant's challenges to CRIM's submission of exhibits without translations and to the court's allowance of extra filings by defendants, but find no error warranting reversal of the district court's judgment.

APPENDIX B – OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO FILED AUGUST 13, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

CIVIL NO. 01-2325 (JAG)

LIONEL LUGO RODRIGUEZ, *et al.*,

Plaintiffs,

v.

PUERTO RICO INSTITUTE OF CULTURE, *et al.*,

Defendants.

OPINION AND ORDER

GARCIA-GREGORY, District Judge.*

This is an action brought by plaintiffs, Dr. Lionel Lugo Rodriguez ("Lugo") ARPO, S.E., d/b/a Plaza Suroeste Mall ("Mall"), Plaza Oasis & Hotel Oasis Inc., Southwest Investment Corporation and Inn Management (collectively, "plaintiffs") against Federal Insurance Company ("Federal Insurance"), Puerto Rico Institute of Culture ("PRIC"), Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Héctor Cazul, Mildred González Valentín, Collection Center for Municipal Income ("CRIM"), Ramón Nazario, Carlos Martínez, Manuel Velázquez, Orlando Mas, Orlando Hernández, and Osvaldo González Aviles, all sued in their individual and official capacities (collectively, "defendants"). The verified

* Mario Arroyo, a third year student at Tulane Law School, assisted in the research and preparation of this opinion.

complaint asserts four causes of action against the defendants. (1) a civil claim for damages under the Organized Crime and Control Act of 1970, Pub.L. No 91-452, Section 901(a), 84 Stat. 941, Racketeering Influenced and Corrupt Organization ("RICO"); (2) a claim for violation of plaintiffs civil rights under 42 U.S.C. § 1983, 1985 and 1986 premised under certain acts and omissions of defendants under color of state law; (3) a tort claim pursuant to Article 1802 of the Puerto Rico Civil Code ("the Code"); and (4) a claim for vicarious liability under Article 1803 of the Code. Currently pending before the Court are defendants' motion to dismiss and for summary judgment (Docket Nos. 15, 39, 65, and 87).[1] The Court will grant these motions for the reasons set forth below.[2]

FACTUAL BACKGROUND

The facts that originate this case began in 1987 when Lugo purchased some real estate consisting of a lot and a building in San Germán. Lugo wanted to develop a

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1. CRIM filed a motion to dismiss. (Docket No. 15). PRIC filed a motion to dismiss and for summary judgment. (Docket No. 39). Federal Insurance moved to join PRIC's motion to dismiss and summary judgment and filed a motion for partial summary judgment (Docket Nos. 55 and 65.), which has been recently opposed by the plaintiffs and the PRIC. (Docket Nos. 102 and 104.) Individual co-defendants Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández filed a motion to join PRIC's motion to dismiss. (Docket No. 87). Individual co-defendants Héctor Cazul, Manuel Velázquez, and Orlando González Aviles have not responded to the plaintiffs' claims.

2. The Court finds it unnecessary to decide Federal Insurance's motion for partial summary judgment based on the absence of insurance coverage in view of its decision on PRIC's motion to dismiss and/or for summary judgment which was joined by Federal Insurance. This joinder results in Federal Insurance's dismissal from the suit together with PRIC, and to that extent moots Federal Insurance's request for partial relief based on lack of insurance coverage.

commercial project in the lot and building. On January 21, 1988 Lugo applied for the required permits and submitted a preliminary construction plan for a Mall to the Puerto Rico Administration of Regulations and Permits ("ARPE"). On July 20, 1988, ARPE responded with a "Notice of objection" pursuant to which Lugo had to submit an endorsement from PRIC for the proposed construction because of certain historical tunnels that could be affected by the construction. Lugo then submitted the preliminary Mall construction plans to PRIC.

PRIC informed Lugo that it would approve the preliminary construction plans only if certain recommendations it was making regarding the three façades of the building existing in the property were incorporated to the final construction plans, in addition to the preservation of the historical tunnels. (Docket No. 39 at 3). Lugo submitted the letter from the PRIC to ARPE for its consideration. ARPE construed the letter as an authorization of PRIC for the proposed preliminary construction plans and conditionally approved them. ARPE stated that the endorsement of PRIC was conditioned on the inclusion of the recommendations regarding the façades in the final construction plans. (Docket No. 39 at 3).

On February 16, 1989, architect López Reyes, representing PRIC, made several observations to Lugo regarding the amended construction plans submitted by Lugo, as well as the initial PRIC recommendations respecting the preliminary construction plans, and requested that these observations be incorporated as soon as possible. (Docket No. 39 at 3). In response, Lugo, through architect Héctor L. Torres of Archicorps (a consulting firm hired by Lugo) sent a letter to PRIC, informing that ARPE was requiring its endorsement for the project. In the letter, Lugo stated that only one of the

three façades of the original building would not be modified. He also indicated that since so little of the building remained on the lot, the structure to be built would be made out of steel and the characteristics of the architecture and the new amended plans would incorporate elements that would be more adequate to the operation of a shopping center. (Docket No. 39 at 4). Ortiz Colón, a PRIC architect, informed Lugo that the project would only be acceptable if all the existing building façades were to be preserved in their current state.

On October 19, 1989, Lugo and ARPE reached an agreement whereby the permits would be granted if the project complied with PRIC's façade recommendations. In response to the agreement with ARPE, PRIC informed that Lugo's supposed "PRIC endorsement" submitted to ARPE was not official since it had not been signed by an authorized officer. Hence, PRIC had not officially endorsed the project.

On September 10, 1991, Lugo sent a letter requesting PRIC's endorsement for the project's tax exemption. PRIC denied the application for endorsement. The final decision as to whether a potential tax payer is entitled to a tax exemption once it has PRIC's endorsement lies exclusively on the Secretary of the Treasury. PRIC's intervention is limited to one of endorsement. (Docket No. 39 at 9.) Since Lugo was not pleased with the decision, he requested the PRIC's Board of Directors to review the decision. After receiving documentary evidence and oral testimony, an official examiner recommended that the application for PRIC's endorsement for tax exemption be denied. (Docket No. 39 at 6.) The Board of Directors adopted said report and denied the application.[3]

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3. Plaintiff does not specify on which date the Board of Directors adopted said report.

Thereafter, Lugo sought review in the Puerto Rico Circuit Court of Appeals. The Puerto Rico Circuit Court of Appeals addressed Lugo's allegations that PRIC had endorsed construction of the Mall and that PRIC officials had made false reports in his application. On December 9, 1998, the Court held that it was clear that the endorsement for the construction was limited to certain corrective measures related to the tunnel running underneath the Mall and that said endorsement did not approve the work to be performed in the building. (Docket No. 39 at 11.) It expressly held that it was obvious that the Mall project had never obtained PRIC's official endorsement, and that during its development Lugo never seriously considered framing the Mall according to the best principles of historical preservation. (Docket No. 39 at 12). It also held that Lugo had expressed in two occasions that he was not applying for a tax exemption and that he was now estopped by his own acts in pursuing such application inasmuch as he had waived it. In its conclusion, the Court expressed that Lugo did not establish that there were any irregularities in the PRIC administrative and final decision denying his application for the tax exemption that would justify reversal.

On January 14, 1999, the plaintiff filed a petition for certiorari before the Puerto Rico Supreme Court seeking review of the Court of Appeals decision. The Supreme Court denied certiorari on March 5, 1999.

On July 10, 2001, the plaintiff filed suit in the Mayaguez Court of First Instance alleging that PRIC had filed a false and fraudulent report which had caused the denial of the requested tax exemption. On March 12, 2002 The Mayaguez Court of First Instance granted defendants' motion for summary judgment on *res judicata* grounds and entered judgment against the plaintiffs' action with prejudice. Meanwhile, on October 2, 2001, plaintiffs had

filed in this Court the present complaint against PRIC and the other co-defendants. Simultaneously with the filing of the Complaint, plaintiffs filed a request for a temporary restraining order, which was denied. (Docket No. 4.)

DISCUSSION

A. *Motion to Dismiss Standard*

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, a complaint may not be dismissed unless it appears beyond doubt that plaintiffs can prove no set of facts in support of their claim which would entitle them to relief. *See Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 530 (1st Cir.1995). The Court accepts all well-pleaded factual allegations as true, and draws all reasonable inferences in plaintiff's favor. *See Correa-Martinez v. Arrillaga-Belendez*, 903 F.2d 49, 51 (1st Cir.1990). The Court need not credit, however, "bald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" when evaluating the Complaint's allegations. *Aulson v. Blanchard*, 83 F.3d 1, 3 (1st Cir.1996). When opposing a Rule 12(b)(6) motion, "a plaintiff cannot expect a trial court to do his homework for him." *McCoy v. Massachusetts Institute of Technology*, 950 F.2d 13, 22 (1st Cir.1991). Plaintiff is responsible for putting her best foot forward in an effort to present a legal theory that will support her claim. *Id.*, at 23 (*citing Correa-Martinez*, 903 F.2d at 52). Plaintiff must set forth "factual allegations, either direct or inferential, regarding each material element necessary to sustain recovery under some actionable theory." *Gooley v. Mobil Oil Corp.*, 851 F.2d 513, 514 (1st Cir.1988).

Appendix B

B. *Summary Judgment Standard*

The court's discretion to grant summary judgment is governed by Rule 56 of the Federal Rules of Civil Procedure. Rule 56(c) sets forth the standard for ruling on summary judgment motions: The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. F.R.C.P. 56(c). The critical question is whether a genuine issue of material fact exists. A genuine issue exists if there is sufficient evidence supporting the claimed factual dispute to require a choice between the parties' differing versions of the truth at trial. *Morris v. Government Dev. Bank of Puerto Rico*, 27 F.3d 746, 748 (1st Cir.1994); *LeBlanc v. Great Am. Ins. Co.*, 6 F.3d 836, 841 (1st Cir.1993). A fact is material if it might affect the outcome of the suit under the governing law. *Morrissey v. Boston Five Cents Sav. Bank*, 54 F.3d 27, 31 (1st Cir.1995).

In order to assist the court in the daunting task of searching for genuine issues of material fact in the record, this district adopted Local Rule 311.12. *See Corrada Betances v. Sea-Land Service, Inc.*, 248 F.3d 40, 43- 44 (1st Cir.2001). This rule, requires, in relevant part, that a party moving for summary judgment submit, in support of the motion, "a separate, short concise statement of material facts as to which the moving party contends there is no genuine issue to be tried and the basis of such contention as to each material fact, properly supported by specific reference to the record." D.P.R.R. 311.12. In turn, the rule requires the party opposing a summary judgment motion, here Lugo, to submit a "separate, short, and concise statement of the material facts as to which it is contended that there exists a genuine issue to be tried, properly supported by specific references to the record." D.P.R.R. 311.12. It is clearly

established in this District that compliance with Local Rule 311.12 is critical, given that the Court will only consider the facts alleged in the aforementioned 311.12 statements when entertaining the movant's arguments. *See Rivera de Torres v. Telefónica de Puerto Rico,* 913 F.Supp. 81 (D.P.R.1995). Defendants, PRIC and Federal Insurance, filed the requisite 311.12 statement with appropriate references to the record. Defendants seek to support all the facts contained in their 311.12 statement with the findings of fact and conclusions of law made in the state court proceedings.

Plaintiffs opposed PRIC's summary judgment motion and recently opposed Federal Insurance's summary judgment motion. Plaintiffs, however, have failed to comply with the so-called "anti-ferret rule," as they have not presented a concise statement of material facts as to which there is a genuine issue to be tried. The Court is not required to "ferret through the record" lurking for facts that may favor the plaintiffs when those facts were not proffered under a counter-designation of facts as required by Local Rule 311.12. *Morales,* 246 F.3d at 33. "When a party opposing a motion for summary judgment fails to comply with the 'anti-ferret rule' the statement of material facts filed by the party seeking summary judgment shall be deemed . . . admitted." *Mendez Marrero v. Toledo,* 968 F.Supp. 27, 34 (D.P.R.1997); *Tavarez v. Champion Prods., Inc.,* 903 F.Supp. 268, 270 (D.P.R.1995).

Here the plaintiffs took the risk "to sit idly by and allow the summary judgment proponent to configure the record." *Kelly v. United States,* 924 F.2d 355, 358 (1st Cir.1991). Although the nonmovant's failure to provide a statement of contested material facts does not automatically warrant the granting of summary judgment, "it launches the nonmovant's case down the road towards an easy dismissal." *Mendez Marrero,* 968 F.Supp. at 34.

Appendix B

Since all material facts in the PRIC's and Federal Insurance's statements of uncontested material facts are deemed admitted, the Court need only examine whether, given the uncontested facts, PRIC and Federal Insurance are entitled to judgment as a matter of law.

I. *Res Judicata*

Defendants argue that Lugo is barred from prosecuting this action by the doctrine of *res judicata*, as incorporated in 28 U.S.C. § 1738.[4] Plaintiffs on the other hand sustain that the application of the *res judicata* defense is inapplicable to this case. They claim that the plaintiffs are different, that the cause of action under RICO is not the same and that this case falls under the fraud exception to the rule of *res judicata*. The Court disagrees.

"The doctrine of *res judicata*—meaning literally that the thing has been decided—binds the parties from litigating or re-litigating any issue or claim that was adjudicated in a prior case." *Suarez-Cestero v. Pagan-Rosa*, 2002 WL 824122 at 9 (D.P.R. March 11, 2002). *Res judicata* (also known as, "claim preclusion"), forecloses litigation of all matters that have been decided in an earlier case, while the rule of collateral estoppel (also known as, "issue preclusion"), precludes re-litigation of issues actually adjudicated in an earlier proceeding. *Id.* (*citing* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction*, §§ 4404 and 4402 (1982)).

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4. 28 U.S.C. § 1738 provides in pertinent part as follows: "The records and judicial proceedings of any court of any . . . State, Territory or Possession [of the United States], or copies thereof, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

Appendix B

Section 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgment emerged. *Kremer v. Chemical Construction Corporation,* 456 U.S. 461, 466, S.Ct 1883 (1982). Thus the question of the preclusive effect of a judgment issued by a Puerto Rico state court depends on Puerto Rico law. *See, Migra v. Warren City School District Board of Education,* 465 U.S. 75 (1984).

In Puerto Rico, judgments can be given preclusive effect only if they are final and on the merits. *See Millán v. Caribe Motors Corp.,* 83 P.R. Dec. 474 (1961); *Stitzer v. University of Puerto Rico,* 617 F.Supp. 1246, 1254 (D.P.R.1985).

Under Puerto Rico law, the party asserting claim preclusion or *res judicata* must establish: (a) the existence of a prior judgment on the merits which is "final and unappealable", (b) the perfect identity of the thing or cause, and (c) the perfect identity of the parties and the capacity in which they acted. *Boateng v. InterAmerican University, Inc.,* 210 F.3d 56 (1st Cir.2000). Defendants allege that all these factors are present in the case and that consequently *res judicata* forecloses this litigation.

a. ***Prior judgment on the merits which is "final and unappealable"***

The Puerto Rico Supreme Court has repeatedly stated that in order to be given *res judicata* effect, a judgment must be "final and unappealable." *Rivera v. Insurance Co. of Puerto Rico,* 103 P.R. Dec. 91 (1974); *Sucesión De Pablo Zayas Berríos v. Berrios,* 90 P.R. R. 551 (1964). The denial of certiorari by the Puerto Rico Supreme Court is a final and unappealable judgment against Lugo. Therefore the requisite for finality is present for the application of preclusion.

b. ***Identity of thing or cause.***

It is evident, from the Puerto Rico Circuit Court of Appeals decision, that the cause, facts and claims upon which the plaintiffs based their complaint in the State court are, in fact, the same as the cause and claims stated in the case before this Court. In *Lausell Marxuach v. Díaz de Yañez,* 103 P.R. Dec. 533 (1975), "cause" is defined as "the principal ground, the origin of the actions or exceptions raised and decided, and it must not be mistaken for the means of proof nor for the legal grounds of the claims adduced by the parties", while "thing" is termed "the object or matter over which the action is exercised."

The requirement of identity of causes does not prevent the *res judicata* doctrine from being applied to a second case simply because the plaintiff alleges a new legal theory in the new case. *Futura Development v. Centex Corp.,* 761 F.2d 33, 44 (1st. Cir.1985). Lugo's cause and thing in the state litigation centered on the tax exemption. The cause and thing in the instant action is the *same* tax exemption. While the previous State Court action and the present action may be premised upon different legal theories, they both arose from the same set of facts— denial by PRIC of Lugo's request for tax exemption. It was because of the denial of such exemption that plaintiffs claim that PRIC and the other co-defendants allegedly violated their rights. Thus, the Court fails to see how Lugo can characterize both causes of action as different, when they did, in fact, arise from the tax exemption controversy itself. Therefore, the required identity of object and cause between the State Court judgment and the present suit is present for *res judicata* purposes.

c. ***Identity of parties***

Plaintiffs point out that the present action contains new parties that were not parties in the State Court action. Nevertheless, the defense of *res judicata* is applied even when the named parties are different, as long as the real parties in interest are identical. *See, Arecibo Radio Corporation v. Commonwealth,* 825 F.2d 589, 591 (1st Cir.1987). Lugo, the owner of the Mall, was the applicant for endorsement by the PRIC of the project. In an attempt to circumvent the doctrine of *res judicata,* Lugo has added as co-plaintiffs; ARPO, S.E., d/b/a "Plaza Suroeste Mall", Plaza Oasis & Hotel Oasis Inc., Southwest Investment Corporation and Inn Management. Since he is the owner of these corporations, there is no doubt that the real party in interest is Lugo.

The plaintiffs have also included as co-defendants PRIC employees; Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Héctor Cazul and Mildred González Valentín and CRIM; Ramón Nazario, Carlos Martínez, Manuel Velázquez, Orlando Mas, Orlando Hernández, and Osvaldo González Aviles. This is also an attempt to circumvent the *res judicata* doctrine inasmuch as the PRIC is the real party in interest since it acts through its officials and employees. As a result, the Court concludes that all parties are the same for *res judicata* purposes except Federal Insurance, which as insurer of the PRIC is entitled to assert such a defense in this case.

d. ***Public Policy—Fraud***

The Complaint alleges that several defendants from PRIC participated in a conspiracy by providing fraudulent testimony and/or altering files and records from plaintiff's building's records. Because of this alleged fraud, plaintiffs argue that *res judicata* should not be applied in this case.

Appendix B

In rare occasions where there is a great public interest at stake, the Supreme Court of Puerto Rico has allowed certain exceptions to the *res judicata* doctrine. *Bonafont Solis v. American Eagle,* 1997 WL 423416, 28-29, (97 JTS 86, June 5, 1997). Under Puerto Rico law, *res judicata* will not be applicable when (1) a judgment was entered pursuant to an invalid acceptance by the defendant of the claim; (2) the court entering the judgment lacked jurisdiction to do so; (3) an attempt to appeal failed through no fault of the plaintiff; or (4) there was fraud. *Medina v. Chase Manhattan Bank,* 737 F.2d 140, 142-143 (1st Cir.1984)

Regarding the allegation of the alleged "conspiracy to commit fraud" for denial of PRIC's endorsement, the State Court held that PRIC acted properly because the denial was based on the plaintiff's failure to comply with PRIC's requirements. The sworn statements on which plaintiff's allegations rely contain numerous suppositions and statements regarding PRIC's endorsements of the Project. The subject matter of these statements has been previously presented in the State Court action.

The Puerto Rico Court of Appeals action decided the issue of PRIC's alleged fraud concerning Lugo's tax exemption request. Lugo could have submitted the sworn statements attached to the complaint during the initial administrative proceedings if he had adequately prepared for the same. Plaintiffs had the opportunity to fully litigate their claims both at an administrative level and before the Puerto Rico Circuit Court of Appeals on the fraud allegations presently before this Court. They cannot now pretend to relitigate these issues and have a second bite at the apple.

Several federal appellate courts have applied the doctrine of claim preclusion to cases in which plaintiffs in an earlier state court proceeding have failed to bring their

fraud claims invoking RICO. In *Kaufman v. BDO Seidman,* 984 F.2d 182 (6th Cir.1993), the Sixth Court applied the preclusion doctrine where plaintiffs had previously and unsuccessfully prosecuted a malpractice claim against their financial adviser. The Court held that plaintiff's RICO claims were precluded because the factual issues of causation in the two actions were sufficiently similar to bar subsequent prosecution of a RICO claim in federal court against the same defendants.[5] Accordingly, Lugo is estopped under the doctrine of res judicata from bringing another action on the same grounds. Therefore, the plaintiffs's claims against PRIC; Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, and CRIM; Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández in both their personal and official capacities must be dismissed.

II. *The Sufficiency of the RICO Claims*

Even if the *res judicata* doctrine were not to apply, however, the Court finds that plaintiffs have failed to adequately plead a RICO claim. To substantiate the RICO claim, plaintiffs allege that defendants executed a racketeering scheme to defraud them and subsequently engaged in mail fraud and wire fraud *inter alia.*

The First Circuit has described the standard for a motion to dismiss in a civil RICO case as follows: The complaint must be anchored in a bed of facts, not allowed to float freely on a sea of bombast. In other words, a court

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5. Similarly, in *Evans v. Dale,* 896 F.2d 975 (5th Cir.1990), the Court held that the doctrine of *res judicata* barred plaintiffs' RICO claim, because the claims of the parties had been the subject of a previous state court proceeding. The Court also found that the plaintiff's wife could have brought her RICO claim in the earlier proceeding and her failure to do so was fatal to her subsequent effort to bring such a claim in federal court. *citing, Dibbs v. Gonsalves,* 921 F.Supp. 44, 49-50 (D.P.R.1996).

assessing a claim's sufficiency has no obligation to take matters on blind faith; it need not credit bald assertions, unsubstantiated conclusions, or outright vituperation. *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 44 (1st Cir.1991). Hence, to avert dismissal a civil RICO complaint must, at a bare minimum, state facts sufficient to portray (i) specific instances of racketeering activity within the reach of the RICO statute and (ii) a causal nexus between that activity and the harm alleged.

Also, in order to recover under RICO, a plaintiff must prove that the defendant engaged in "prohibited activities" consisting of predicate acts which constitute a "pattern of racketeering activities" 18 U.S.C. §§ 1961-1968.

The Court has reviewed plaintiff's bald assertions and unsubstantiated conclusions, and concludes that the alleged criminal acts by the defendants do not have the same or similar purposes, results, participants, victims or methods. Plaintiffs' allegations that the defendants have acted fraudulently by acting, and conspiring to act, in a manner designed to deny them their property rights are conclusory and devoid of minimal facts substantiating them. Plaintiffs's claims and testimony generally allege no more than that the defendants "acted in racketeering activities to defraud the plaintiff". Inasmuch as plaintiffs have failed to meet the pleading requirements for a RICO complaint to survive, their RICO claims against PRIC, CRIM, Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas and Orlando Hernández must be dismissed.[6]

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6. Co-defendants Héctor Cazul, Manuel Velázquez, and Orlando González Aviles have not opposed the claim against them. Therefore the RICO claim against them may proceed.

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III. The Butler Act

It should be noted that plaintiffs seek to prevent further enforcement of the collection of taxes imposed by CRIM and also request monetary relief for the "fraudulent" tax assessments as a remedy. The Court finds that plaintiffs' requests are barred by the Butler Act.

The Butler Act prohibits suits in federal Court for the purpose of restraining the assessment or collection of any tax imposed by the laws of Puerto Rico. See, 48 U.S.C. § 872. The jurisdictional bar set forth by the Butler Act is not absolute. It does not apply to cases where the State courts lack a plain, speedy and efficient remedy. Secrist Intern., Ltd. v. Secretary of the Treasury, 525 F.Supp. 980, 981 (D.P.R.1981).

In this case the procedure afforded by the State legislature is plain, speedy and efficient. Plaintiffs prosecuted their claims and participated in several administrative and Court proceedings in which they had ample opportunity to vindicate their claims. These proceedings comply with the minimal procedural criteria required for this type of remedy.

Although plaintiffs may be dissatisfied with the state administrative and judicial procedure as a whole, they have not identified significant procedural flaws that render it inappropriate or corrupt. The remedy established by the PRIC complies with minimum procedural requirements imposed by the Supreme Court. It is clear that plaintiffs had their day in Court for purposes of the Butler Act and may not now seek to enjoin the collection of taxes imposed by the laws of Puerto Rico in this Court. Plaintiffs's claim against CRIM must be dismissed for lack of subject matter jurisdiction.

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IV. *Plaintiffs' 42 U.S.C. § 1983 Claims Against Named Defendants in their official and personal capacities*

Plaintiffs also allege that PRIC's actions constitute a violation to 42 U.S.C. § 1983 and seek damages. This type of remedy is also barred by the Eleventh Amendment. *See Acevedo López v. Police Dept. of the Commonwealth of P.R.*, 247 F.3d 26, 28 (1st Cir.2001). It is well established that the Eleventh Amendment bars a § 1983 action against a State, State Agency, or any State Official in his official capacity for monetary damages that would have to be paid from the state treasury. *See Wang v. New Hampshire Board of Registration in Medicine*, 55 F.3d 698, 700 (1st Cir.1995). Accordingly, plaintiffs's § 1983 claim against Robert L. Bounds Davila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, Orlando Hernández, Héctor Cazul, Manuel Velázquez, and Orlando González Aviles in their official capacities must be dismissed.

Plaintiffs also seek relief under § 1983 against the above co-defendants in their personal capacities.[7] It is well settled that in order for a claim to be cognizable under section 1983, plaintiffs must plead and prove three elements: (1) that the defendants acted under color of state law; (2) that plaintiffs were deprived of federally protected rights, privileges, or immunities; and (3) that the defendants's alleged conduct was causally connected to the plaintiffs' deprivation. *Gutierrez-Rodriguez v. Cartagena*, 882 F.2d 553, 558 (1st Cir.1989). Hence, to succeed in a § 1983 action, plaintiffs must prove that defendants actions were a cause in fact or a proximate cause of plaintiffs' injury. *See Collins v. City Harker Heights*, 503 U.S. 115 (1992).

7. § 1983 expressly embraces actions to redress deprivations, under color of state law, of . . . rights, privileges, or immunities secured by the Constitution. *Pontarelli v. Stone*, 930 F.2d 104, 114 (1st Cir.1991).

Plaintiffs have proven the first element. The defendants were clearly acting under color of state law. Lugo, however, has failed to establish that he was deprived of a federally protected right, privilege, or immunity. Just because the defendants denied Lugo's application for the endorsement of his project does not mean that he was deprived of his property rights. There are also no convincing facts indicating that the defendants' conduct was causally connected to the plaintiffs' deprivation. The Court, after engaging in a liberal reading of the Complaint, analyzing the alleged facts and indulging all reasonable inferences in favor of plaintiffs, finds that plaintiffs have not pled sufficient facts to establish a claim under § 1983. Plaintiffs' § 1983 claim against co-defendants Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández in their personal capacities must be dismissed.[8]

V. *Supplemental State Claims*

Since no federal claims remain, the court will dismiss all supplemental state claims without prejudice pursuant to 28 U.S.C. § 1367(c)(3), except as to the defendants Héctor Cazul, Manuel Velázquez, and Orlando González Aviles given their failure to oppose plaintiffs' federal claims.

CONCLUSION

In view of the foregoing reasons, Defendants motions to dismiss and for summary judgment (Docket No. 15,39, 65 and 87) are hereby GRANTED. Plaintiffs's RICO claims against CRIM, PRIC, Robert L. Bounds Dávila, Jorge Ortiz

8. Héctor Cazul, Manuel Velázquez, and Orlando González Aviles have not opposed the 1983 claims. Therefore the claims against them may proceed.

Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández both in their personal and official capacities are hereby DISMISSED. Plaintiffs' claims against CRIM, PRIC, Robert L. Bounds Dávila, Jorge Ortiz Colón, Doris Maza, Mildred González Valentín, Ramón Nazario, Carlos Martínez, Orlando Mas, and Orlando Hernández under § 1983 are also dismissed. Federal Insurance's motion to join PRIC's motion for summary judgment is granted and all claims against Federal Insurance are dismissed. The supplemental law claims against these defendants are dismissed without prejudice, pursuant to 28 U.S.C. § 1367. Plaintiffs' federal and supplemental claims against co-defendants Hector Cruz, Manuel Velázquez, and Orlando González Avilés remain. The Court, however, sees no reason why these claims should not be equally dismissed for the same reasons that the claims against the other co-defendants have been dismissed. Accordingly, the Court orders plaintiffs to show cause on or before August 23, 2002, why the claims against the remaining co-defendants should not be dismissed.

IT IS SO ORDERED.

San Juan, Puerto Rico, this 9th day of August, 2002.

APPENDIX C – ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DENYING PETITION FOR REHEARING DATED JUNE 1, 2004

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 02-2305

LIONEL LUGO RODRIGUEZ, ET AL.,

Plaintiffs, Appellants,

v.

PUERTO RICO INSTITUTE OF CULTURE, ET AL.,

Defendants, Appellees.

Order entered by Chief Judge Michael Boudin, Senior Judge Frank M. Coffin, Judge Juan R. Torruella, Judge Bruce M. Selya, Judge Sandra L. Lynch, Judge Kermit V. Lipez, Judge Jeffrey R. Howard. The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for the holding of a rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeal be reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc be denied.